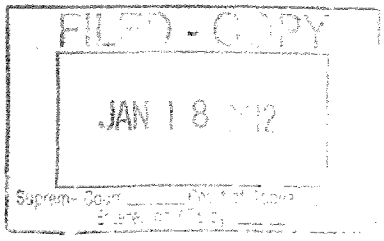
1-18-2012

State v. Icanovic Appellant's Reply Brief 1 Dckt. 38477

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38477
	)	
v.	)	
	)	
HASSAN ICANOVIC,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL E. WETHERELL
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. # 5867

SARAH E. TOMPKINS
Deputy State Appellate Public Defender
I.S.B. # 7901
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

Nature of the Case

In this case, the State has conceded that, if the U.S. Supreme Court Opinion in *Padilla v. Kentucky*[1] applies to Mr. Icanovic's claims on appeal, the district court erred in dismissing Mr. Icanovic's petition for post-conviction relief in light of the *Padilla* Opinion. (*See* Respondent's Brief, p.21 n.3.) The **sole** contention of the State on appeal is that the *Padilla* Opinion does not apply to Mr. Icanovic's case in light of the modified retroactivity analysis from *Teague v. Lane,*[2] as adopted by the Idaho Supreme Court in *Rhoades v. State.*[3] This means that the sole question presented on appeal for this Court's resolution is the limited legal question of what law applies to Mr. Icanovic's claims on appeal. Mr. Icanovic submits that, because *Padilla* clearly applies to Mr. Icanovic's post-conviction claim of ineffective assistance of counsel, it is undisputed that the district court erred in dismissing his petition.

First, the retroactivity analysis in *Teague/Rhoades* only comes into play when the decision in question is issued **after** the petitioner's underlying judgment of conviction has become final. Where the underlying judgment is not yet final at the time of the issuance of an opinion, that opinion applies to the case under well-established law. Because Mr. Icanovic's underlying conviction was not final at the time *Padilla* was issued, the Opinion in *Padilla* applies to Mr. Icanovic's post-conviction petition.

Second, even if Mr. Icanovic's judgment of conviction was final at the time *Padilla* was issued, the *Padilla* Opinion would apply to Mr. Icanovic's case because the *Padilla*

---

[1] *Padilla v. Kentucky*, ___ U.S. ___, 130 S.Ct. 1473 (2010).
[2] *Teague v. Lane*, 489 U.S. 288 (1989).

Opinion did not announce a new rule, but merely applied an old rule to a new set of factual circumstances. Under U.S. Supreme Court precedent, reviewing courts give retroactive application to a decision where an old rule is applied to a new set of facts, and therefore *Padilla* would apply to Mr. Icanovic's substantive claims in post-conviction.

Finally, even if the *Padilla* Opinion announced a new rule of law, under Idaho's independent review for retroactive application as set forth in *Rhoades*, Idaho's unique jurisprudence requires that such an alteration to the fundamental guarantee of competent counsel be deemed a substantive rule under Idaho law. Given this, Mr. Icanovic submits that the *Padilla* Opinion would apply to the resolution of the legal issues raised in his post-conviction petition.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Icanovic's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

[3] *Rhoades v. State*, 149 Idaho 130 (2010).

ISSUES

1. Was Mr. Icanovic's underlying judgment of conviction not final at the time of the issuance of the *Padilla* Opinion, rendering the *Padilla* Opinion controlling over Mr. Icanovic's post-conviction claims and further rendering modified approach to the *Teague* analysis as adopted in *Rhoades* inapplicable to this case?

2. Assuming, *arguendo*, that the *Teague/Rhoades* standard for retroactivity applies to this case, did the U.S. Supreme Court in *Padilla* articulate a new rule, or articulate an old rule applicable to a new set of facts?

3. Assuming, *arguendo*, that the *Padilla* Court articulated a new rule, was this rule a substantive rule under Idaho's unique jurisprudence, therefore rendering the rule in *Padilla* subject to retroactive application?

ARGUMENT

I.

Mr. Icanovic's Underlying Judgment Of Conviction Was Not Final At The Time Of The Issuance Of The *Padilla* Opinion, Rendering The *Padilla* Opinion Controlling Over Mr. Icanovic's Post-Conviction Claim And The Modified Approach To The *Teague* Analysis As Adopted In *Rhoades* Inapplicable To This Case

A. Introduction

The State has asserted on appeal that the modified *Teague* standard, as articulated in *Rhoades*, applies to this Court's determination of what law to apply to the legal issues in this appeal. However, the State misses a critical point in the analysis – that the *Teague/Rhoades* retroactivity analysis only applies where the defendant's underlying judgment of conviction is final at the time of the announcement of the precedent at issue. Where the defendant's underlying judgment is not yet final at the time of the issuance of an opinion, that opinion applies to the resolution of the underlying substantive issues. Because Mr. Icanovic's conviction was not yet final at the time the *Padilla* Opinion was issued, it clearly applies to his post-conviction claims and to this Court's review under well-established law.

B. The Standard For Whether The Retroactivity Analysis Under *Teague/Rhoades* Applies To The Determination Of The Law Governing A Case Is Whether The Opinion In Question Was Issued Before Or After The Defendant's Underlying Conviction Became Final Under State Law

The modified *Teague* standard, as applied in Idaho under *Rhoades*, only applies to cases where the defendant is seeking collateral review of a judgment **and** the underlying judgment was already final at the time of the issuance of the opinion at issue. Where the underlying judgment of conviction is not final at the time of the issuance of an

opinion, *stare decisis* principles mandate that the opinion would apply to the defendant's post-conviction claims in such a case.

In *Rhoades v. State*, the Idaho Supreme Court was confronted with the question of whether to apply the *Teague* standard to collateral review in cases where the defendant/petitioners' underlying judgments of conviction were final. *See Rhoades v. State*, 149 Idaho 130, 133-139 (2010). In *Rhoades*, the petitioners sought retroactive application of the U.S. Supreme Court Opinion in *Ring v. Arizona*[4] to collateral review of the petitioners' sentences of death. *Id.* at 132. In each of the petitioners' cases, the underlying judgments of conviction were all final prior to the announcement of the *Ring* Opinion. *Id.*

In explaining the crux of the *Teague* holding, the Idaho Supreme Court in *Rhoades* correctly recognized that the retroactivity principles from *Teague* only apply to those cases where the underlying judgment was already final at the time the case law in question was announced. *Rhoades*, 149 Idaho at 134, 138. The *Rhoades* Court held that, "Under *Teague*, new constitutional rules of criminal procedure are not applicable **to those cases that have become final before the new rule was announced**." *Id.* at 134 (emphasis added). Further, the *Rhoades* Court noted that previous Idaho case law restricting retroactive application of precedent were limited to cases where the defendant's judgment was final before the issuance of the opinion at issue. *Id.* at 136-138. Additionally, the *Rhoades* Court emphasized policies regarding finality of judgments when adopting the modified *Teague* standard articulated in *Rhoades*. *Id.* at 138.

---

[4] *Ring v. Arizona*, 536 U.S. 584 (2002).

This is consistent with the express terms of the *Teague* Opinion itself. From the outset, the retroactivity question addressed by *Teague* is limited to those cases that were final at the time the decision in question was announced. This is encapsulated in the *Teague* Court's own definition of what it means to be a new rule, holding that "a case announces a new rule if the result was not dictated by precedent existing **at the time the defendant's conviction became final**." *Teague*, 489 U.S. at 302 (emphasis added). Additionally, the *Teague* Court noted what it means for an underlying judgment of conviction to be "final" for purposes of retroactivity analyses. A judgment is final for such purposes where, "the judgment of conviction was rendered, **the availability of appeal exhausted**, and the time for petition for certiorari had lapsed." *Id.* at 295 (quoting *Allen v. Hardy*, 478 U.S. 255, 258, n.1 (1986)) (emphasis added). This is consistent with the manner in which Idaho courts determine the finality of judgment, finding that a judgment becomes final upon expiration of the time in which to appeal if no appeal is actually taken from the underlying judgment. *See, e.g., State v. Jakoski*, 139 Idaho 352, 355 (2003) (noting that the defendant's conviction became final following the expiration of his time to appeal from his judgment in light of the defendant's failure to appeal).

With regard to those cases where the defendant's underlying judgment of conviction was not yet final at the time the case law in question was issued, that case generally must have retroactive application – both on direct and collateral review. The Court in *Teague* noted that, under its prior opinion in *Griffith v. Kentucky*, "a new rule for the conduct of criminal prosecutions **is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in**

which the new rule constitutes a 'clear break' with the past." *Id.* at 304-305 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)) (emphasis added).

That an underlying judgment is not final until the expiration of the time to file a direct appeal is further articulated under the U.S. Supreme Court Opinion in *Jiminez v. Quarterman*, 555 U.S. 113 (2009). In *Jiminez*, the Court held that finality of judgments, for purposes of collateral review under federal habeas, is expressly defined as, "the conclusion of direct review **or the expiration of the time for seeking such review**." *Id.* at 119. Until the expiration of the time in which a defendant may seek direct review, "the 'process of direct review' has not 'com[e] to an end' and 'a presumption of finality and legality' cannot yet have 'attache[d] to the conviction and sentence.'" *Id.* at 119-120 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)); *see also Caspari v. Bolen*, 510 U.S. 383, 390-391 (1994) (defendant's underlying conviction was not final for purposes of retroactivity until *availability* of direct appeal was exhausted).

The *Griffith* standard for retroactive application of precedent to cases where the underlying judgment is not yet final has also been expressly adopted by the Idaho Supreme Court in determining whether case law applies to cases not yet final at the time of issuance of the opinion. *See, e.g., State v. Frederick*, 149 Idaho 509, 515 (2010); *State v. Josephson*, 123 Idaho 790, 795 (1993). Idaho appellate courts have consistently articulated that, where the case law in question is announced prior to the underlying judgment of conviction becoming final, even cases articulating a new rule for the conduct of criminal proceedings must be applied in resolving the substantive issues presented by such a case. *See, e.g., Frederick*, 149 Idaho at 515; *State v. Perry*, 150 Idaho 209, 228 (2010); *Fetterly v. State*, 121 Idaho 417, 418-419 (1991).

While the State has suggested to this Court that the retroactivity question turns on the time of the alleged error, rather than on the time at which the defendant's underlying conviction has become final, the United States Supreme Court has already considered – and rejected – similar claims in reviewing the applicability of *Teague*. *See Powell v. Nevada*, 511 U.S. 79, 81-85 (1994) (*see also* Respondent's Brief, p.17 (tacking applicability of *Padilla* Opinion to the time at which trial counsel provides advice regarding entry of plea.)) In *Powell*, the Nevada Supreme Court had held that a U.S. Supreme Court opinion regarding constitutional requirements for probable cause determinations did not apply to the defendant's case because the opinion was issued after the defendant's arrest. *Id.* at 83. Thus, the underlying Nevada opinion used the time of the alleged constitutional violation as the point at which to measure retroactivity, rather than the point in time at which the defendant's underlying conviction was final.

The U.S. Supreme Court in *Powell* held this was error. The question for whether the retroactivity analysis from *Teague* applied was whether the defendant's **conviction** was final at the time that the opinion at issue was announced – not whether the precedent existed at the time of the alleged violation. *Powell*, 511 U.S. at 84-85. In cases where the underlying conviction was not yet final at the time the rule is announced, the standard from *Griffith* controls and the defendant is entitled to the benefit of that rule. *Id.*

C. Mr. Icanovic's Underlying Judgment Of Conviction Was Not Final At The Time The Opinion In *Padilla* Was Issued, And Therefore *Padilla* Governs His Claims On Appeal

From the outset, the State in this case has never asserted that Mr. Icanovic's underlying judgment of conviction was final at the time the Opinion in *Padilla* was

announced, with is a condition precedent to the applicability of the retroactivity standards contained within the *Teague/Rhoades* analysis. (*See* Respondent's Brief, generally.) This is likely because Mr. Icanovic's underlying judgment of conviction was **not** final at the time *Padilla* was issued, and therefore *Padilla* applies to Mr. Icanovic's post-conviction claim under clear Idaho law.

It is undisputed, and was previously found by the district court in this case, that, while Mr. Icanovic's underlying judgment of conviction was entered on September 2, 2009, the district court retained jurisdiction over his case, and the court did not enter its order placing Mr. Icanovic on probation until February 18, 2010 – within the court's period of retained jurisdiction.[5] (R., pp.4-5, 7-8, 15-16.) Under Idaho law that was operative at the time, Mr. Icanovic's judgment of conviction was not final until 42 days from the court's order placing him on probation. Because the *Padilla* Opinion was issued prior to the expiration of 42 days from the court's probation order, this Opinion applies to Mr. Icanovic's contentions within his post-conviction petition.

Under the version of I.A.R. 14(a) that was operative throughout Mr. Icanovic's underlying criminal proceedings, the act of retaining jurisdiction by the district court tolled the time from which to appeal from any substantive issues relating to an underlying judgment of conviction. *See* Appendix A.[6] The version of Idaho Appellate Rule 14(a) that was operative at the time of the underlying criminal proceedings in Mr. Icanovic's case provided in pertinent part that:

---

[5] This Court may wish to note that the State has incorporated this same accounting of the underlying procedural facts in Mr. Icanovic's case in its Respondent's Brief. (*See* Respondent's Brief, p.1.)

[6] For ease of this Court's reference, the version of I.A.R. that existed at the time of the proceedings in Mr. Icanovic's case has been appended to this brief.

> In a criminal case, the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction pursuant to Idaho Code. **When the court releases its retained jurisdiction or places the defendant on probation, the time within which to appeal shall commence to run.**

See 2010 I.A.R. 14(a)[7], Appendix A.

Cases interpreting this provision uniformly held that the district court's action of retaining jurisdiction in a criminal case operated to toll the 42-day period in which to file an appeal from the underlying judgment until the expiration of the court's period of retained jurisdiction and the court's relinquishment of jurisdiction or grant of probation in that case. *See, e.g., State v. Ward*, 150 Idaho 446, 448 (Ct. App. 2010); *State v. Schultz*, 147 Idaho 675, 677 (Ct. App. 2009); *State v. Wargi*, 119 Idaho 292, 293 (Ct. App. 1991). Thus, it is only after the expiration of the period of retained jurisdiction that the time to file a notice of appeal from the underlying judgment began to run under the version of I.A.R. that was operative at the time of the criminal proceedings in Mr. Icanovic's case. *Id.*

---

[7] This Court may wish to note that the provisions of I.A.R. 14(a) with regard to the time within which to file an appeal where the district court has retained jurisdiction have since been altered. The current version of the rule provides that, "If, at the time of judgment, the district court retains jurisdiction pursuant to Idaho Code 19-2601(4), the length of time to file an appeal from the sentence contained in the criminal judgment shall be enlarged by the length of time between the entry of the judgment of conviction and entry of the order relinquishing jurisdiction or placing the defendant on probation; provided, however, that all other appeals challenging the judgment must be brought within 42 days of that judgment." I.A.R. 14(a). However, this revision does not apply to Mr. Icanovic's underlying criminal proceedings, as the amendment was not effective until July 1, 2011, which is well after both the district court's order retaining jurisdiction and the court's order placing Mr. Icanovic on probation; and further because "[p]rocedural rules in criminal cases that could affect substantial rights" are given prospective, rather than retroactive application. *See, e.g., State v. McLeskey*, 138 Idaho 691, 695 (2003).

The district court retained jurisdiction over Mr. Icanovic's case, and did not enter its order placing him on probation until February 18, 2010. (R., pp.4-5, 7-8, 15-16.) Therefore, Mr. Icanovic had 42 days from the date the district court placed him on probation before his underlying judgment of conviction became final under *Teague*. *Teague*, 489 U.S. at 295. Under the law operative at the time, the date upon which Mr. Icanovic's conviction became final was April 1, 2010 – 42 days from the district court's order placing him on probation. Although by the slimmest of margins, Mr. Icanovic's conviction was not yet final on the date the *Padilla* Opinion was announced on March 31, 2010. Given that Mr. Icanovic's conviction was not yet final at the time of the *Padilla* Opinion, this Opinion applies to his post-conviction claim of ineffective assistance of counsel under well-established principles of retroactivity. *See Teague*, 489 U.S. at 304-305; *Griffith*, 479 U.S. at 328.

II.

Assuming, *Arguendo*, That The *Teague/Rhoades* Standard For Retroactivity Applies To This Case, The U.S. Supreme Court In *Padilla* Did Not Articulate A New Rule, But Rather Articulated An Old Rule Applicable To A New Set Of Facts, And Therefore The *Padilla* Opinion Governs Mr. Icanovic's Post-Conviction Claim

A. Introduction

The U.S. Supreme Court Opinion in *Padilla* did not announce a new rule of law. Rather, this Opinion was nothing more than the application of prior, well-established case law to a new set of facts. The *Padilla* Opinion was merely a further elaboration of entrenched legal principles from the Court's prior Opinions in *Strickland v. Washington*,[8] *Hill v. Lockhart*, and *I.N.S. v. St. Cyr.* Because *Padilla* did not announce a new rule, but

[8] *Strickland v. Washington*, 466 U.S. 668 (1984).

instead merely applied well-established legal principles to new facts, the Opinion should be given retroactive application by this Court.

B. The U.S. Supreme Court In *Padilla* Did Not Articulate A New Rule, But Rather Articulated An Old Rule Applicable To A New Set Of Facts, And Therefore The *Padilla* Opinion Governs Mr. Icanovic's Post-Conviction Claim

1. Under The Federal Standard For Whether A Rule Constitutes A "New Rule" For Purposes Of Retroactivity Analysis, The U.S. Supreme Court Opinion In *Padilla* Did Not Articulate A New Rule, But Merely Applied Well-Established Case Law To A New Set Of Facts, Thus Rendering Retroactive Application Appropriate

Mr. Icanovic asserts that the U.S. Supreme Court Opinion in *Padilla* did not announce a new rule of law, and therefore this opinion applies retroactively.

As has been noted, *Padilla* existed prior to the time that Mr. Icanovic's underlying judgment of conviction became final, and therefore it applied to the post-conviction proceedings relating to that judgment. However, even assuming that Mr. Icanovic's underlying judgment of conviction was final at the time the *Padilla* Opinion was announced, he asserts that *Padilla* did not announce a new rule, and therefore the Opinion would apply to resolve the underlying issue in Mr. Icanovic's post-conviction.

The U.S. Supreme Court has articulated the three-part analysis under *Teague* in order to determine the retroactive application of a rule of law:

> In determining whether a state prisoner is entitled to habeas relief, a federal court should apply *Teague* by proceeding in three steps. First, the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes. Second, the court must "[s]urve[y] the legal landscape as it then existed," and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Finally, even if the court determines that the defendant seeks the benefit of a new rule,

> the court must decide whether that rule falls within one of the two narrow exceptions to the nonretroactivity principle.

Caspari v. Bolen, 510 U.S. 383, 390 (1994) (internal citations omitted).

Under the retroactivity standard articulated in *Teague*, new constitutional rules of criminal procedure are not applicable to cases that have become final before the new rules were announced. *Rhoades*, 149 Idaho at 134. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301. "Under the *Teague* framework, an old rule applies on both direct and collateral review, but a new rule is generally only applicable to cases that are still under direct review." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Put another way, if a case does not announce a new rule, but rather applies a well-established rule to a new set of facts, then the opinion is to be applied retroactively. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 380-381 (2000).

At base, the *Padilla* Opinion is nothing more than the application of legal principles that were well-established at the time of the Opinion to the set of facts that were before the Court. Three primary cases that pre-dated *Padilla* formed the primary substance of the Opinion's rationale, and dictated the result in the *Padilla* case. First and foremost, the *Padilla* Opinion is nothing more than a straight application of the general principles set forth in *Strickland v. Washington*, which has long been the standard by which claims of ineffective assistance of counsel have been measured. *See Padilla*, 130 S.Ct. at 1480-1486.

Mr. Icanovic contends that the analysis from the United Supreme Court in *Williams v. Taylor* is controlling on this point. While the *Williams* Opinion dealt with the issue of whether a refinement of *Strickland* was "clearly established precedent" for

purposes of federal review under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Williams*, 529 U.S. at 379-380. While the *Williams* decision was rendered in the context of AEDPA, the Court was clear that the standards codified by this act were the same as those employed in *Teague* for determining whether an opinion announced a new rule of law. *Id.* at 380 ("It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.") In light of this, the *Williams* Court applied the same analysis as *Teague* to the question of whether the refinement to *Strickland* at issue was clearly established law.

As a starting point, the Court in *Williams* recognized that old rules under *Teague* may be sufficiently clear even if these rules are expressed in terms of a generalized standard as opposed to a bright-line rule:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . . **Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent**.

Williams, 529 U.S. at 382 (quoting *Wright v. West*, 505 U.S. 277, 308-309 (1992) (KENNEDY, J., concurring)) (emphasis added).

Thereafter, the *Williams* Court concluded that the general rule provided in *Strickland* for measuring whether a defendant has received constitutionally adequate counsel fell squarely within such a category:

> It is past question that the rule set forth in *Strickland* qualifies as "clearly established Federal law, as determined by the Supreme Court of the United States." That the *Strickland* test "of necessity requires a case-by-

> case examination of the evidence," obviates neither the clarity of the rule nor the extent to which the rule must be seen as "established" by this Court. This Court's precedent "dictated" that the Virginia Supreme Court apply the *Strickland* test at the time that court entertained Williams' ineffective-assistance claim. And it can be hardly said that recognizing the right to effective assistance of counsel "breaks new ground or imposes a new obligation on the States."

Williams, 529 U.S. at 391 (internal citations omitted).

Padilla was, by the express terms of the Opinion itself, nothing more than a straight-forward application of *Strickland* to the facts in the defendant's case. *See Padilla*, 130 S.Ct. at 1480-1486. This was merely the Court applying a general standard that inherently required a case-by-case analysis in practical application. Under *Williams*, such an opinion does not articulate a new rule, but rather applies well-established legal standards to a novel factual situation. *See also U.S. v. Orocio*, 645 F.3d 630, 638-639 (3d. Cir. 2011); *Commonwealth v. Clarke*, 949 N.E.2d 892, 903 (Mass. 2011) (holding that the analysis in *Padilla* was, "the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms ... to new facts," and that it was therefore not a new rule). In such cases, retroactive application of the rule is required.

Additionally, the *Padilla* Court's application of *Strickland* was similarly dictated by two prior U.S. Supreme Court cases – *Hill v. Lockhart* and *I.N.S. v. St. Cyr*. Both of these cases were cited as authority underpinning the decision in *Padilla*. *See Padilla*, 130 S.Ct. at 1480-1486. In *Hill*, the U.S. Supreme Court extended its analysis under *Strickland* to challenges to guilty pleas based upon claims ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). And, in the subsequent U.S. Supreme Court Opinion in *I.N.S. v. St. Cyr*, the Court elaborated on the interplay

between criminal guilty pleas and the immigration consequences of such pleas. *I.N.S. v. St. Cyr*, 533 U.S. 289, 322-323 (2001).

In fact, the Court in *St. Cyr* actually articulated that standards for competent counsel that would later be developed more fully in *Padilla* – both that the American Bar Association's Standards for Criminal Justice required that, "if a defendant would face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of those consequences,'" and that "competent defense counsel, following the advice of numerous practice guides," would advice non-citizen clients of the immigration consequences of a plea. *Id.* at 322 n.48, 323 n.50. That the *St. Cyr* Opinion had already set out this standard for competent representation of counsel was expressly noted by the *Padilla* Court. *Padilla*, 130 S.Ct. at 1483. The *Padilla* Opinion did not announce any new rule, but merely merged its prior statements in *Strickland*, *Hill,* and *St. Cyr* to hold that competent defense counsel must advise a non-citizen client as to the immigration consequences of a guilty plea. Because this is merely the application of well-established case law to a new factual context, the *Padilla* Opinion did not announce a new rule for purposes of retroactivity. *See also Orocio*, 645 F.3d at 639.

That *Padilla* did not announce a new rule is also apparent from other aspects of the *Padilla* Opinion itself. First, Jose Padilla himself received the benefit of the U.S. Supreme Court's Opinion. *Padilla*, 130 S. Ct. at 1486. This direct application of the rule announced in the *Padilla* Opinion, without reference to the *Teague* analysis of retroactivity, has been held to be an important indicator that the *Padilla* Court did not consider this Opinion to articulate a "new rule." *See, e.g., People v. Gutierrez*, 954 N.E.2d 365, 377 (Ill. Ct. App. 2011).

Second, the terms of the Opinion demonstrate that the Court contemplated the retroactive applicability of its decision. The *Padilla* Court expressly addressed concerns raised by the Solicitor General regarding the displacement of those convictions already final that were obtained through guilty pleas. *Padilla*, 130 S. Ct. at 1484-1485. Yet, rather than respond by stating that the Opinion would not have retroactive application, the Court instead responded that the impact of retroactive application would likely be minimal. *Id.* Citing to the absence of a "flood" of litigation in prior cases expanding upon *Strickland*, and to the high bar set by the *Strickland* standard itself, the *Padilla* Court concluded that lower courts would be able, under the circumstances identified by the Solicitor General, to effectively employ the *Strickland* framework "to separate specious claims from those with substantial merit." *Id.* Finally, the *Padilla* Court expressed skepticism that many final convictions would be disturbed upon retroactive application, as the standards articulated in the Opinion had been recognized under "professional norms" for "at least the past 15 years." *Id.* This implicit recognition of retroactive application of the *Padilla* Opinion has frequently been cited as an important indication that *Padilla* did not announce a new rule. *See, e.g., Gutierrez*, 954 N.E.2d at 377-378; *Clarke*, 949 N.E.2d at 903; *Campos v. State*, 798 N.W.2d 565, 569 (Minn. Ct. App. 2011); *People v. Nunez*, 917 N.Y.S.2d 806, 809 (N.Y. App. Div. 2010).

This is further consistent with numerous opinions that have determined that the *Padilla* Opinion does not announce a new rule of law, and therefore has retroactive application. *See, e.g., Orocio*, 645 F.3d at 637-640; *Gutierrez*, 954 N.E.2d at 377-378; *Clarke*, 949 N.E.2d at 896-904; *Campos*, 798 N.W.2d at 569-570; *Nunez,* 917 N.Y.S.2d at 809; *Ex Parte De Los Reyes*, 350 S.W.3d 723, 728-729 (Tex. App. 2011).

2. Even If The *Padilla* Opinion Announced A "New Rule" Under The Federal Standard For Purposes Of Retroactivity, Under Idaho's Unique Jurisprudence, The *Padilla* Opinion Did Not Announce A New Rule Given Our Independent Retroactivity Analysis Pursuant To *Rhoades*

While the State relies very heavily on two federal cases finding that *Padilla* articulated a new rule, Mr. Icanovic asserts that these federal cases are of very little assistance to this Court in its own retroactivity review. This is due to the independent analysis that this Court conducts regarding whether a rule constitutes a "new rule" for retroactivity purposes.

Consistent with federal courts, Idaho has provided for retroactive application of case law where the case in question did not announce a new rule of law, but merely clarified existing legal standards. *See Perry*, 150 Idaho at 228. But, under the *Rhoades* Opinion, the Idaho Supreme Court has also held that Idaho applies an independent test for whether a rule constitutes a "new rule," under Idaho's modified *Teague* analysis.

The *Rhoades* Court expressly acknowledged the wide criticism levied against federal application of the *Teague* standard with regard to how narrowly these decisions view what constitutes a new rule of constitutional law. *Rhoades*, 149 Idaho at 138-139. The Court further recognized that the narrow construction common to the federal courts conducting habeas corpus review is largely based upon concerns against excessive federal interference in state law determinations. *Id.* However, the Idaho Supreme Court, in reviewing state post-conviction actions, "does not have a similar concern for comity when interpreting whether a decision pronounces a new rule of law for purposes of applying *Teague*." *Id.* at 139.

Given this, the Idaho Supreme Court has held that Idaho courts must independently review what constitutes a new rule, or whether a new rule is a watershed

rule, in the exercise of "independent judgment, based upon concerns of this Court and the 'uniqueness of our state, our Constitution, and our long-standing jurisprudence.'" *Rhoades*, 149 Idaho at 138-139 (quoting *State v. Donato*, 135 Idaho 469, (2001)). And, under Idaho's unique jurisprudence, there is even greater reason for this Court to conclude that *Padilla* did not announce a new rule for retroactivity purposes.

In various aspects, Idaho's unique jurisprudence recognizes the intimate relation between a guilty plea in a criminal case and the immigration consequences that may flow therefrom. These consequences are "now virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla*, 130 S.Ct. at 1478. The "drastic measure" of deportation – the modern equivalent of banishment – as it exists now is described by the *Padilla* Court as follows:

> We have long recognized that deportation is a particularly severe "penalty"; but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation find it even more difficult.

Id. at 1481-1482 (internal citations omitted).

The Idaho Supreme Court, likely in recognition of the changes in immigration law rendering deportation nearly inevitable for a vast number of noncitizen defendants, amended I.C.R. 11 in 2007 to require that district courts "inform all defendants that if the defendant is not a citizen of the United States, the entry of a plea or making of factual admissions could have consequences of deportation or removal, inability to obtain legal citizenship in the United States, or denial of an application for United States citizenship."

I.C.R. 11(d)(1). Idaho's establishment of this requirement as part of the entry of plea process pre-dates the issuance of the *Padilla* Opinion, and reflects our state's unique judgment as to the integral relation between criminal guilty pleas and the immigration consequences flowing therefrom. *See also Campos*, 798 N.W.2d at 569-570 (recognizing the pre-existing requirement for a trial court to advise a defendant regarding potential immigration consequences of a guilty plea as an indicator that the *Padilla* opinion was not a "new rule" under Minnesota's independent *Teague* analysis).

The intimate connection between a guilty plea and resulting deportation consequences is further reflected in the Idaho Court of Appeals opinion of *State v. Tinoco-Perez*, 145 Idaho 400, 401-402 (Ct. App. 2008). Although acknowledging that immigration consequences of a felony conviction had been held to be "collateral" to the plea, the court in *Tinoco-Perez* recognized that the relationship between a criminal conviction and resulting immigration consequences was a cognizable ground to request sentencing relief in a criminal case:

> Although the risk of deportation or other impact on immigration status is generally considered a "collateral consequence" of a criminal conviction, it is nevertheless a very significant consequence for the defendant. Indeed, for many non-citizens, any term of imprisonment imposed by the court will be quite secondary to the immigration consequences in impact on the defendant's life and future. Therefore, the effect on immigration status is an appropriate consideration for the trial court in fashioning a sentence or considering Rule 35 relief.

Tinoco-Perez, 145 Idaho at 402. The court further tied the significance of immigration consequences resulting from criminal convictions to the decision of the Idaho Supreme Court to amend the criminal rules to require that trial courts advise non-citizen defendants of the potential immigration consequences of a guilty plea. *Id.* at 402 n.1. In light of Idaho's unique jurisprudence that had previously recognized the intimate ties

between criminal convictions and immigration consequences resulting therefrom, Mr. Icanovic asserts that *Padilla* did not articulate a new rule under *Rhoades*.

Additionally, the standards articulated by the American Bar Association (ABA) for "The Defense Function" have traditionally carried great weight with Idaho appellate courts with regard to measuring contemporary standards for competency of counsel. In discussing specifically the right to competent counsel under Article I, § 13 of the Idaho State Constitution, the Idaho Supreme Court stated, "As a beginning point to this inquiry, this Court recognized the American Bar Association's standards entitled 'The Defense Function.'" *Gibson v. State*, 110 Idaho 631, 635 (1986). The ABA standards for defense counsel and for the conduct of criminal proceedings have retained a significant place in Idaho's jurisprudence with regard to measuring competent representation of trial counsel in numerous opinions, and have often been referred to as "the starting point" under our Idaho State Constitution in evaluating claims of ineffective assistance of counsel. *See, e.g., Mitchell v. State*, 132 Idaho 274, 279-280 (1998); *Aragon v. State*, 114 Idaho 758, 761 (1988); *State v. Tucker*, 97 Idaho 4, 8-9 (1975); *Murphy v. State*, 143 Idaho 139, 146 (Ct. App. 2006); *Davis v. State*, 116 Idaho 401, 411 (Ct. App. 1989); *State v. Larkin*, 102 Idaho 231, 233 (Ct. App. 1981).

The *Padilla* Court noted that, even prior to its Opinion, the American Bar Association had recognized the necessity of competent defense counsel to advise a non-citizen defendant of the immigration consequences of his or her plea. *Padilla*, 130 S. Ct. at 1482. In fact, the U.S. Supreme Court noted the same in its prior Opinion in *St. Cyr* – which was issued nearly ten years prior to the *Padilla* Opinion. *St. Cyr*, 533 U.S. at 322 n.48. Because Idaho places special emphasis on the American Bar

Association's promulgated standards for the conduct of criminal trials in determining our own state constitutional right to counsel, and because these standards recognized the necessity of competent counsel to advise a client regarding immigration consequences of a conviction well in advance of the *Padilla* Opinion, Mr. Icanovic asserts that our unique jurisprudence would dictate that *Padilla* would not be considered a "new rule" under our independent state review for retroactivity.

While the State places much reliance on an Idaho Court of Appeals opinion that had found that trial counsel was not ineffective for failing to seek a judicial recommendation against deportation, Mr. Icanovic submits that this opinion was no longer controlling law given the intervening changes in the landscape of immigration law, and its intimate relation with criminal convictions, by the time the *Padilla* Opinion was issued. (*See* Respondent's Brief, pp.16-17.) Specifically, the State relies upon the opinion in *Retamoza v. State*, 125 Idaho 792 (Ct. App. 1994) to argue that *Padilla* articulated a new rule. However, *Retamoza* was rendered at a time when the interplay between criminal convictions and immigration consequences was fundamentally different, and therefore the result from that case would not be clearly dictated in light of intervening changes to immigration law as it relates to criminal convictions.

The *Retamoza* opinion dealt with, *inter alia*, the issue of whether the petitioner's trial counsel was ineffective for failing to seek a judicial recommendation against deportation (JRAD). *Retamoza*, 125 Idaho at 795, 874 P.2d at 606. The *Retamoza* Court then determined that, because the opportunity for a JRAD dealt with deportation, and deportation was a collateral consequence of a guilty plea, the Sixth Amendment

guarantee of effective assistance of counsel did not extend to the failure to inform the petitioner of the potential to seek a JRAD. *Id.* at 795-797, 874 P.2d at 606-608.

However, the *Strickland* analysis presupposes that trial counsel's obligations may shift and change over time, and is measured by the contemporaneous state of the law. *Strickland*, 466 U.S. at 690 (court reviewing a claim of ineffective assistance of counsel claim "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). Given the intervening changes to immigration law subsequent to *Retamoza*, it cannot be said that this opinion dictated the result in subsequent cases where the landscape of immigration law was drastically altered.

The *Retamoza* opinion was issued in 1994 – two years prior to a radical overhaul of immigration law so as to eliminate the authority of the Attorney General to grant discretionary relief from deportation in nearly all cases where the non-citizen has committed a felony offense. *See Padilla*, 130 S.Ct. at 1480. As noted by the *Padilla* Court, after the 1996 amendments to the Immigration and Nationality Act, deportation is "practically inevitable" for convictions for most felony offenses. *Id.*; *see also* 8 U.S.C. § 1229b. The *Padilla* Court then expounded on the effect of these changes:

> These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Id.

Additionally, the *Padilla* opinion discussed specifically the fact that the JRAD provisions have been eliminated entirely as of 1990, thus eradicating one of the few mechanisms to avoid deportation. *Id.* Therefore, between the time of the acceptance of the plea at issue in *Retamoza* – 1988 – and the time of the underlying proceedings in Mr. Icanovic's case, the landscape of the immigration law had shifted to the point where there was neither the potential for him to seek a JRAD nor a grant of discretionary relief from the Attorney General.

Moreover, the *Retamoza* opinion was issued prior to the U.S. Supreme Court's opinion in *St. Cyr*, which noted that "competent defense counsel, following the advice of numerous practice guides," would advise clients regarding important immigration consequences of a guilty plea. *St. Cyr*, 533 U.S. at 323 n.50. This passage from the U.S. Supreme Court reflects the sum and substance of the subsequent holding in *Padilla*, and therefore the holding in *Retamoza* would have been altered given this intervening law.

Finally, whether the rule would encompass the overruling of prior precedent has not been deemed dispositive to the analysis in Idaho regarding whether an opinion articulates a new rule, or rather an old rule applied to a new set of facts. For example, the Idaho Supreme Court in *Perry* found that it was not announcing a new rule even though the opinion itself overruled prior case law. *Id.* at 227-228. The Idaho Supreme Court in *Perry* expressly disavowed the standards articulated in the Court's prior decision of *Smith v. State,*[9] and yet this in no way precluded the Court from finding that the standards articulated in *Perry* were not "new" for purposes of retroactive application

[9] *Smith v. State*, 94 Idaho 469 (1971).

under *Rhoades*. *Id.* This is consonant with the holding of other jurisdictions that have similarly recognized that the mere existence of conflicting authority does not necessarily mean that a rule is new. *See Clarke*, 949 N.E.2d at 36; *Campos*, 798 N.W.2d at 568-570 (recognizing that *Padilla* did not announce a new rule even though it effectively overruled a prior state decision). Given this, the issue of whether or not the opinion in question overruled prior case law is not dispositive of the analysis in Idaho regarding whether an opinion articulates a new rule.

Because Idaho does not necessarily apply the same exacting standards for what constitutes an old versus a new rule for purposes of retroactivity, Mr. Icanovic asserts that this Court should find that the decision in *Padilla* did not announce a new rule. He further notes that the appellate courts of Minnesota – which has the same retroactivity analysis that was adopted by our Supreme Court in *Rhoades* – has held that *Padilla* did not announce a new rule. *See Campos*, 798 N.W.2d at 568-570; *see also Rhoades*, 149 Idaho 136 (adopting the modified *Teague* standard as adopted by the Minnesota Supreme Court). Given that Idaho has adopted the same modified standard for review as that applied by the appellate courts in Minnesota, Mr. Icanovic submits that this Court should likewise find that *Padilla* did not announce a new rule under Idaho's unique jurisprudence.

III.

Assuming, *Arguendo*, That The *Padilla* Court Articulated A New Rule, This Rule Constitutes A Substantive Rule And A Watershed Rule Under Idaho's Unique Jurisprudence, Therefore Rendering The Rule In *Padilla* Subject To Retroactive Application By This Court

A. Introduction

Under Idaho's unique jurisprudence with regard to collateral challenges in post-conviction, and particularly in light of Idaho's more expansive right to the competent representation of counsel, Mr. Icanovic submits that the decision in *Padilla* constituted a watershed rule. As such, even if the *Padilla* Opinion announced a new rule of law, this rule should be given retroactive application by this Court.

B. Under Idaho's Modified Approach To The *Teague* Analysis, Idaho Courts Must Always Determine Whether The Unique Jurisprudence Of Idaho Requires A Different Result To The Retroactivity Analysis

As was previously noted, the Idaho Supreme Court adopted a modified form of the *Teague* analysis in *Rhoades*. *See Rhoades*, 149 Idaho at 135-139. However, while same structural analysis applies in Idaho to issues of retroactivity in cases of a final judgment, the *Rhoades* Court did not adopt a reflexive application of *Teague* with regard to the meaning of the retroactivity standards at issue.

Instead, the *Rhoades* Court accepted the invitation of the U.S. Supreme Court in *Danforth v. Minnesota* to define each of the terms in the *Teague* analysis under state law. In *Danforth*, the U.S. Supreme Court addressed whether state courts could modify the retroactivity analysis it had previously set forth in *Teague* in deciding whether to apply new case law to a collateral challenge where the defendant's underlying

conviction was already final. *Danforth v. Minnesota*, 552 U.S. 264, 267-269 (2008). The *Danforth* Opinion concluded that states were free to do so. *Id.* at 275-282.

Upon remand, the Minnesota Supreme Court in *Danforth* elected not to abandon the general standards of review under *Teague* in its entirety. *Danforth v. State*, 761 N.W.2d 493, 495-500 (Minn. 2009). However, the Minnesota Supreme Court recognized that a lock-step application of the federal standards regarding the *Teague* analysis might not be advisable in its state court determinations on collateral review. Therefore, the *Danforth* Court also held that Minnesota courts must independently review cases to determine whether fundamental fairness requires retroactive application of new constitutional rules of criminal procedure. *Id.* at 500.

Following the lead of the *Danforth* Opinion, and the Minnesota Supreme Court's subsequent determination on remand to independently define the terms of the *Teague* analysis under state law, the *Rhoades* Court held that it is mandatory for a reviewing court in Idaho to "independently review requests for newly announced principles of law under the *Teague* standard":

> We now explicitly adopt the *Teague* standard in criminal cases on collateral review. Furthermore, we follow the lead of the Minnesota Supreme Court and hold that **Idaho courts must independently review requests for retroactive application of newly-announced principles of law under the *Teague* standard**.

Rhoades, 149 Idaho at 136.

The Court in *Rhoades* explained why such independent review was necessary with regard to state post-conviction claims. First, the Court noted that, among the criticisms to the *Teague* approach was that the U.S. Supreme Court imposed a definition of a new rule that was overly broad, and therefore excluded most of the

decisions issued with regard to constitutional questions. *Rhoades*, 149 Idaho at 138. Second, the *Rhoades* Court noted the common criticism in how narrowly the U.S. Supreme Court had defined the two exceptions providing retroactive application for new rules that were either "substantive rules" or "watershed rules." *Id.* Finally, and critically, the *Rhoades* Court acknowledged that the primary motivator for the strictness of the *Teague* standards under federal law was concerns against excessive interference on the part of the federal courts in state law determinations. The *Rhoades* Court expressly acknowledged that, in Idaho, "this Court does not have a similar concern for comity when interpreting whether a decision pronounces a new rule of law for purposes of applying *Teague*." *Id.* at 139.

Given this, the Idaho Supreme Court expressed throughout *Rhoades* that it was, "committed to independently analyzing requests for retroactive application of newly-announced principles of law with regard to the uniqueness of our state, our constitution, and our long-standing jurisprudence." *Rhoades*, 149 Idaho at 140.

C. Under Idaho's Unique Jurisprudence, And In Light Of The Salient Differences Between Collateral Review Under The UPCPA And Federal Habeas, The *Padilla* Opinion Announced A Watershed Rule Entitled To Retroactive Application Given Idaho's More Expansive Right To Counsel

1. Idaho's Unique Jurisprudence Under The Idaho Uniform Post-Conviction Procedure Act Requires A Lesser Standard For Watershed Rules With Regard To Claims Of Ineffective Assistance Of Counsel, As These Claims Generally May Not Be Brought On Direct Appeal

Mr. Icanovic asserts that, because under Idaho's unique jurisprudence with regard to claims of ineffective assistance of counsel, this Court should apply a lesser standard for what constitutes a watershed rule than is applied under federal *habeas*

corpus review pursuant to *Teague*. This is because such claims generally can only be brought under Idaho law through a collateral attack under the Uniform Post-Conviction Procedure Act (UPCPA), rather than being brought on direct appeal, and therefore the concerns of comity and finality that motivate the federal standard for watershed rules do not apply.

The Idaho Supreme Court in *Rhoades* noted that only two exceptions apply to permit retroactive application of new rules of law under *Teague* – substantive rules of law, which encompass only those rules that place private, individual conduct beyond criminal proscription; and watershed rules of fundamental fairness. *Rhoades*, 149 Idaho at 138-139. But the *Rhoades* Court further noted that the federal courts have interpreted the exception for watershed rules so narrowly that the "U.S. Supreme Court has found no watershed rules in the 19 years since it adopted *Teague*." *Id.*

The narrow manner in which the *Teague* Court interprets both exceptions is the direct result of concerns specific to the context of federal habeas corpus, and concomitant concerns that the federal courts should not unnecessarily interfere with the finality of state court decisions. *Teague*, 489 U.S. at 308-310. This is because federal *habeas corpus*, "'is not intended as a substitute for appeal, nor as a device for reviewing the merits of criminal trials,' but only 'to guard against extreme malfunctions in the state criminal justice systems.'" *Wright v. West*, 505 U.S. 277, 292 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (STEVENS, J., concurring)). In fact, the exhaustion of the claim in state court is a precondition of raising any claim in federal *habeas*. *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 486 (1975). This requirement presupposes that, in nearly all cases, the defendant in federal *habeas* proceedings will

have already obtained a ruling regarding all issues raised in habeas through the state appellate courts from which his or her state criminal conviction arose. *Id.* at 486-490.

The U.S. Supreme Court in *Danforth* recognized that the unique nature of federal habeas corpus review may lead some states to apply a lesser standard of review for retroactivity in light of their own state post-conviction procedures. In fact, the Court noted that it was the unique nature of federal *habeas corpus* review that prompted the standards underpinning the *Teague* analysis. "A close reading of the *Teague* opinion makes clear that the rule it established was tailored to the unique context of federal *habeas* and therefore had no bearing on whether States could provide broader relief in their own post-conviction proceedings than required by that opinion." *Danforth*, 552 U.S. at 277. In fact, because the *Teague* retroactivity analysis was so squarely the product of the particular concerns of the federal court in not disturbing the finality of state law convictions, the *Danforth* Court further noted that these same principles of comity might actually provide a strong basis for state courts to provide much broader application of precedent in their own state post-conviction actions. *Id.* at 279-280.

Idaho's unique jurisprudence regarding collateral challenges to criminal convictions under the UPCPA does not share in any of the salient features of collateral challenges under federal *habeas* that have motivated the federal courts to apply such rigid and incredibly narrow standards for a watershed rule for purposes of retroactivity. This is particularly the case with claims of ineffective assistance of counsel, which normally cannot be brought on direct review and must instead be brought through post-conviction.

In Idaho, a defendant may raise the issue of ineffective assistance of counsel either on direct appeal or in a petition for post-conviction relief, but not both. *Matthews v. State*, 122 Idaho 801, 806 (1992). While the defendant may, in theory, raise a claim of ineffective assistance of counsel on direct appeal, the practical reality is that resolution of such claims almost always turns on facts outside the record on appeal, and therefore expansion of the record through post-conviction is usually required in order to properly adjudicate such claims. *See, e.g., State v. Elison*, 135 Idaho 546, 551-552 (2001); *Carter v. State*, 108 Idaho 788, 791 (1985); *Sparks v. State*, 140 Idaho 292, 296 (Ct. App. 2004); *State v. Santana*, 135 Idaho 58, 66-67 (Ct. App. 2000); *State v. Saxton*, 133 Idaho 546, 549-550 (Ct. App. 1999); *State v. Mitchell*, 124 Idaho 374, 375-376 (Ct. App. 1993). Given this, appellate courts in Idaho routinely decline to entertain claims of ineffective assistance of counsel when they are raised on direct appeal. *Elison*, 135 Idaho at 551-552; *Santana*, 135 Idaho at 66-67; *Saxton*, 133 Idaho at 549-550; *Mitchell*, 124 Idaho at 376.

The requirement that a claim of ineffective assistance be raised through a petition for post-conviction relief, rather than on direct appeal, is all but inescapable for claims of ineffective assistance of counsel of the type addressed by *Padilla*, where the alleged deficiency relates directly to the private consultation occurring between an attorney and client regarding the decision whether to plead guilty. *See Mitchell*, 124 Idaho at 376 (recognizing that claims of ineffective assistance of counsel requiring development outside the trial record typically include issues as to "the adequacy of counsel's communications with the defendant"). Under Idaho's unique post-conviction jurisprudence, such claims would necessarily need to be litigated through collateral

attacks in post-conviction, rather on direct review, because they hinge on evidentiary matters outside the record on direct appeal. Therefore, the standards for justiciability of such claims under Idaho law is the exact opposite as that present in federal *habeas corpus* – rather than requiring that such claims be raised in prior proceedings in order to properly exhaust state remedies, these issues of ineffective assistance of counsel cannot be raised in any proceeding other than a post-conviction petition under Idaho law.

Under requirements of exhaustion of remedies, review of any constitutional issue under federal *habeas corpus* presupposes that the defendant has already had a prior opportunity to litigate the claim at issue. Because collateral attacks in post-conviction are a defendant's first and sole state mechanism to raise claims of ineffective assistance of counsel of the type described in *Padilla*, Mr. Icanovic asserts such claims sufficiently implicate the fundamental fairness of the proceedings so as to be deemed a watershed rule.

2. Idaho's Unique Jurisprudence With Regard To Our More Expansive State Statutory Right To Counsel Requires A Lesser Standard For Watershed Rules With Regard To Claims Of Ineffective Assistance Of Counsel

Under the Sixth Amendment of the United States Constitution, a defendant is only guaranteed the right to counsel at "critical stages" of the criminal proceedings. *See, e.g., Iowa v. Tovar*, 541 U.S. 77, 87 (2004). However, by statute, Idaho's unique jurisprudence provides a right to counsel that is broader in scope than that provided solely under the federal constitution, and therefore reflects a heightened concern for protection of the right to counsel under Idaho law than inheres under the federal constitution.

In addition to having an independent right to counsel under Article I, § 13 of the Idaho State Constitution, criminal defendants in Idaho have extensive rights to the assistance of counsel by virtue of statute. *See, e.g.,* I.C. § 19-852. By statute in Idaho, a criminal defendant has the right to appointed counsel, "to the same extent as a person having his own counsel is so entitled," and is further entitled to the assistance of counsel in post-conviction proceedings under most circumstances. *See* I.C. §§ 19-852, 19-4904. Idaho's general statutory right to the appointment of counsel grants an indigent defendant the right to appointment of counsel for any proceeding in which retained counsel would be entitled to appear. *State v. Young*, 122 Idaho 278, 281-282 (1992). Moreover, this right exists, regardless of whether the right of appointed counsel to appear in a proceeding, "comes from constitution, statute, regulation or ordinance." *Id.* at 282; *see also Smith v. State*, 146 Idaho 822, 833-843 (2009). In addition, Idaho provides for a more expansive right to counsel because Idaho recognizes the right to counsel in order to pursue a discretionary petition for review before the Idaho Supreme Court – a right that was expressly rejected under the Sixth Amendment by the U.S. Supreme Court. *Compare Hernandez*, 127 Idaho 687-688; *Ross v. Moffitt*, 417 U.S. 600, 610-616 (1974).

Especially noteworthy is the fact that, by Idaho's unique jurisprudence and under our statutory laws, a defendant enjoys a statutory right to counsel in post-conviction proceedings. *See, e.g., Charboneau v. State*, 140 Idaho 789, 792-793 (2004). This is quite significant with regard to our state's heightened protection of the right to counsel, as the right to counsel in post-conviction actions is expressly **not** recognized under the

Sixth Amendment to the U.S. Constitution. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-556 (1987).

In fact, the Court in *Finley* expressly recognized that the standards for the right to counsel under the Sixth Amendment are more restrictive than the very standard that is in place by statute in Idaho. In *Finley*, the Court held that the federal constitution does not require the appointment of counsel for an indigent defendant merely because an affluent defendant may retain one for the proceeding in question. *Id.* at 556. "'The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* Thus, the federal standard for the right to counsel is expressly more limited than that afforded to defendants by statute in Idaho – while the Sixth Amendment contains no guarantee that an indigent defendant has the same right to the representation of counsel as the affluent one, Idaho recognizes just such a right by operation of I.C. § 19-852. *See also Young*, 122 Idaho at 281-282.

Moreover, once a statutory right to counsel has been conferred under Idaho law, this right carries with it all the guarantees of effective assistance of counsel as does the federal right to counsel at a critical stage of the proceedings. *See Hernandez v. State*, 127 Idaho 685, 687 (1995). As was noted by the Court in *Hernandez*, the "statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel." *Id.* Therefore, this Court treats the statutory grant of the right to counsel under Idaho law as inherently conferring the right to the effective assistance of counsel on direct appeal. *Id.*

Because Idaho provides for much broader protection of the right to counsel than that recognized under the federal constitution, Mr. Icanovic asserts that this Court should account for this heightened protection when reviewing retroactive application of new rules of law that involve the right to competent representation of counsel. This is particularly the case where the rule in question involves issues of critical importance to the competent representation of criminal defendants, as is the case with *Padilla*.

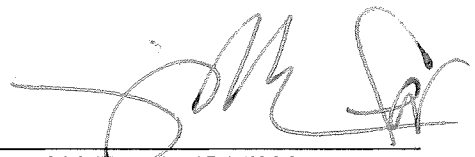
The Court in *Rhoades* has indicated that the standard for watershed rules in Idaho encompasses review for whether the rule implicates the fundamental fairness of the proceedings, and that Idaho courts independently review whether a rule would meet this standard in light of Idaho's jurisprudence and our state constitutional standards. *See Rhoades*, 149 Idaho at 134. In light of Idaho's more expansive right to counsel, both under our constitution and under our statutory laws, Mr. Icanovic asserts that the standards articulated for competent representation of counsel under *Padilla* should be deemed a watershed rule by this Court.[10]

[10] This Court may also wish to note that, in the Minnesota Court of Appeals case of *Campos v. State*, the court indicated that, had the court not already determined that *Padilla* did not articulate a new rule, the Opinion may have been deemed a watershed rule implicating fundamental fairness under its modified *Teague* analysis pursuant to *Danforth*. *See Campos*, 798 N.W.2d at 571 n.3.

CONCLUSION

Mr. Icanovic respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief and remand this case for further proceedings.

DATED this 18th day of January, 2012.



SARAH E. TOMPKINS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

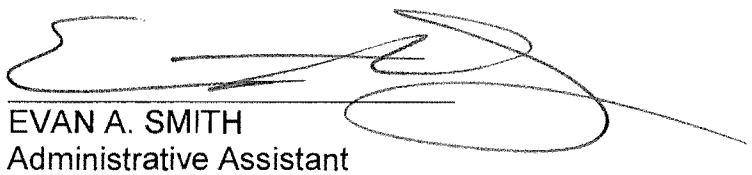
I HEREBY CERTIFY that on this 18th day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

HASSAN ICANOVIC
INMATE # 93756
ISCI
PO BOX 14
BOISE ID 83707

MICHAEL E WETHERELL
DISTRICT COURT JUDGE
E-MAILED BRIEF

ANTHONY GEDDES
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
P.O. BOX 83720
BOISE, ID 83720-0010
Hand delivered to the Attorney General's mailbox at Supreme Court.



EVAN A. SMITH
Administrative Assistant

SET/eas

APPENDIX A

issued by the clerk of the court did not reinvest the trial court with jurisdiction to rule upon its own sua sponte motion to reconsider its prior order granting a new trial. Syth v. Parke, 121 Idaho 162, 823 P.2d 766 (1991).

Review of District Court's Order upon Remand.

Although a district court's order upon remand which dismissed one defendant in a two-defendant case, ordinarily would have required a certificate of finality for appellate review of the dismissal, the Supreme Court deemed the district court's order as functionally equivalent to a certificate of finality because appellate jurisdiction was fully vested when the appeal was initially filed and the court perceived no just reason to delay consideration on appeal of the dismissal order. Madsen v. Idaho Dep't of Health & Welfare, 116 Idaho 758, 779 P.2d 433 (Ct. App. 1989).

Rule 13.4. Delegation of jurisdiction to district court during an appeal.

During a permissive appeal under Rule 12 I.A.R. or an appeal from a partial judgment certified as final under Rule 54(b) I.R.C.P., the Supreme Court may, by order, delegate jurisdiction to the district court to take specific actions and rule upon specific matters, which may include jurisdiction to conduct a trial of issues. A motion for an order under this rule may be filed with the Supreme Court by any party in the district court action or the administrative proceeding. (Adopted March 27, 1989, effective July 1, 1989; amended March 9, 1999, effective July 1, 1999.)

Rule 13.5. Stipulation for vacation, reversal or modification of judgment.

Upon stipulation of all affected parties that a criminal or civil judgment of the trial court or administrative agency may be vacated, reversed, modified or remanded for further hearings, the court may enter an order accomplishing the stipulated result without briefs, oral argument, or an opinion of the court. An order entered by the court pursuant to such a stipulation shall not be considered as precedent for any purpose other than a resolution of that appeal. The clerk of the court shall issue a remittitur for the order under Rule 38 in the same manner as a remittitur on an opinion of the court. (Adopted March 23, 1990, effective July 1, 1990; amended March 20, 1991, effective July 1, 1991.)

STATUTORY NOTES

Compiler's Notes. The Supreme Court Order of March 20, 1991, effective July 1, 1991 renumbered former Rule 33.1 as Rule 13.5.

Rule 14. Time for filing appeals.

All appeals permitted or authorized by these rules, except as provided in Rule 12, shall be taken and made in the manner and within the time limits as follows:

(a) **Appeals From the District Court.** Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment or order of the district court appealable as a matter of right in any civil or

criminal action. The time for an appeal from any civil judgment or order in an action is terminated by the filing of a timely motion which, if granted, could affect any findings of fact, conclusions of law or any judgment in the action (except motions under Rule 60 of the Idaho Rules of Civil Procedure or motions regarding costs or attorneys fees), in which case the appeal period for all judgments or orders commences to run upon the date of the clerk's filing stamp on the order deciding such motion. The time for an appeal from any criminal judgment, order or sentence in an action is terminated by the filing of a motion within fourteen (14) days of the entry of the judgment which, if granted, could affect the judgment, order or sentence in the action, in which case the appeal period for the judgment and sentence commences to run upon the date of the clerk's filing stamp on the order deciding such motion. In a criminal case, the time to file an appeal is enlarged by the length of time the district court actually retains jurisdiction pursuant to Idaho Code. When the court releases its retained jurisdiction or places the defendant on probation, the time within which to appeal shall commence to run. Provided, if a criminal judgment imposes the sentence of death, the time within which to file a notice of appeal does not commence to run until the death warrant is signed and filed by the court.

(b) **Appeals From an Administrative Agency.** An appeal as a matter of right from an administrative agency may be made only by physically filing a notice of appeal with the Public Utilities Commission or the Industrial Commission within 42 days from the date evidenced by the filing stamp of the clerk or secretary of the administrative agency on any decision, order or award appealable as a matter of right. The time for an appeal from such decision, order or award of the industrial commission is terminated by a timely motion for rehearing or reconsideration of the decision or order which, if granted, could affect the decision, order or award (except motions regarding costs or attorneys fees), in which case the appeal period commences to run upon the date of the filing stamp on the order or decision denying such motion or the decision on rehearing or reconsideration. The time for an appeal from such decision, order or award of the public utilities commission begins to run when an application for rehearing is denied, or, if the application is granted, after the date evidenced by the filing stamp on the decision on rehearing. (Adopted March 25, 1977, effective July 1, 1977; amended March 31, 1978, effective July 1, 1978; amended April 3, 1981, effective July 1, 1981; amended April 18, 1983, effective July 1, 1983; amended March 30, 1984, effective July 1, 1984; amended March 21, 2007, effective July 1, 2007; amended March 29, 2010, effective July 1, 2010.)

STATUTORY NOTES

Compiler's Notes. The words in parentheses so appeared in the rule as promulgated.